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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

THE EVERGREENS,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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OCTOBER TERM, 1943

THE EVERGREENS,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The Evergreens prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above-entitled case on April 20, 1944.

Opinions Below.

The opinions of the Tax Court (R. 43), affirming the action of the Commissioner, are reported at 47 B. T. A. 815. The opinion of the Circuit Court of Appeals for the Second Circuit is not yet officially reported, but is printed in full as an appendix to this petition.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered April 20, 1944. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

Whether the principle that judicial determinations necessarily made are conclusive in later suits between the same parties in so far as they are logically relevant thereto, is subject to a hitherto unrecognized limitation to cases where the prior determination is of a matter which is "ultimate" in the later suit.

This question involves four others:

1. Whether the decided cases have not applied the principle of *res judicata* to matters which are merely evidentiary or subsidiary in the later suit.

2. Whether the classification of certain facts or principles arising in litigation as "ultimate" has in legal reasoning a sufficiently certain basis to make it practical to apply it.

3. If a workable distinction between "ultimate" and other matters exists, has this distinction any relation whatever to the purposes of the rule of *res judicata?*

4. Does public policy call for a restriction of the rule of *res judicata?*

Statutes Involved.

REVENUE ACT OF 1934.

"§ 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS

(a) COMPUTATION OF GAIN OR LOSS. The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

§ 112. RECOGNITION OF GAIN OR LOSS—(a) GENERAL RULE. Upon the sale or exchange of property the entire amount

of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

§ 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS—(a) BASIS (UNADJUSTED) OF PROPERTY. The basis of property shall be the cost of such property; except that— * * *

(14) PROPERTY ACQUIRED BEFORE MARCH 1, 1913. In the case of property acquired before March 1, 1913, if the basis otherwise determined under this subsection, adjusted (for the period prior to March 1, 1913) as provided in subsection (b), is less than the fair market value of the property as of March 1, 1913, then the basis for determining gain shall be such fair market value. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date."

Statement of Case.

The essential facts as stated in the opinion below are as follows:

> "The taxpayer is a cemetery company doing business in Brookiyn, in the course of which it sells burial lots. The question at issue is its 'gains,' (Sec. 111(a) of the Revenue Act of 1934), upon the disposition of a part of its property during the two years in question; and that in turn depends upon the 'basis' which it shall be permitted to deduct from the 'amount realized': that 'basis' being the value on March 1, 1913, of the property disposed of. Sec. 113(a)(14). The company's property was of two classes: 'fully improved' lots, and 'partially improved.' During the years 1934 and 1935 it sold a number of 'fully improved' lots, and the City of New York took over for municipal purposes a large tract, composed of 'partially improved' lots. This appeal concerns only the second. The Tax Court allowed, as the 'basis' for the sale of the 'fully improved' lots, $1.55 per square foot, and, as the 'basis' for the 'partially improved' lots, $.35 per square foot.

> It held, as to the value of the 'fully improved' lots, that the Commissioner was estopped by a finding of the Board of Tax Appeals in an earlier proceeding, in which the company's income taxes for the years 1929 to 1933 inclusive had been assessed. The Commissioner raises no question as to the correctness of this finding, and has not appealed. The Tax Court refused, however, to compute a 'basis' for the 'partially improved' lots by deducting from the 'basis' of the 'fully improved' lots, as found by the Board, the cost of fully improving the 'partially improved' lots, which the Board had also found in the first proceeding. The Tax Court altogether disregarded the 'basis' of the 'fully improved' lots as the Board had found it, and proceeded to appraise the value of the 'partially improved' lots from evidence taken in this proceeding. The taxpayer's position is that the Board's order in the first proceeding, not only estopped the Commissioner as to the value of the 'fully improved' lots, but conclusively established that value as an indisputable premise from which, by deducting the cost of the improvements to infer the value of the 'partially improved' lots."

The Circuit Court of Appeals affirmed the judgment of the Tax Court, holding that the value of the improved lots was not, in the instant case, an "ultimate fact", but a "mediate datum" and that the principle of *res judicata* applies only where the matter determined in the earlier suit is an "ultimate fact" in the later.

Specification of Errors to be Urged.

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that the finding of the Board of Tax Appeals in the earlier proceeding that the value of the fully improved lots was $1.55 per square foot was not *res judicata* for all purposes in the instant proceeding.

(2) In affirming the judgment of the Tax Court.